IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02/12/2002

CORAM

THE HON'BLE MR. JUSTICE M. KARPAGAVINAYAGAM
and
THE HON'BLE MR. JUSTICE P. THANGAVEL

CRIMINAL APPEAL No.726 of 1998

1. Oorkaval Perumal
2. S. Sudalaimani
3. S. Vettumperumal
4. Pechi
5. Durai @ Shanmugavel .. Appellants

-Vs-

State Rep. By
Inspector of Police,
Pudukottai Police Station,
Tuticorin District.
(Cr.No.609/93) .. Respondent

Criminal Appeal against the judgment dated 6.8.1998 in S.C.No.181 of 1995 on the file of the Additional Sessions Judge-Cum-Chief Judicial Magistrate, Tuticorin.

!For Appellants : Mr.S.Shanmugavelayutham

^For Respondent : Mr. E. Raja,
Addl. Public Prosecutor.

:JUDGMENT

M. KARPAGAVINAYAGAM, J.

The appellants are A1 and A3 to A6 respectively. Along with A2, they were tried for the offences under Sections 148 and 302 read with 149 I.P.C. The trial Court acquitted A2 and convicted A1 and A3 to A6 for the offences under Sections 148 and 302 read with 149 I.P.C. and sentenced them each to undergo R.I. for one year for the offence under Section 148 I.P.C. and life imprisonment for the offence under Section 302 read with 149 I.P.C. Aggrieved by the same, this appeal has been filed.

2. The case of the prosecution in brief is as follows:
"(a) The deceased Santhanaraj, who belongs to Harijan Community is the husband of Pappa (P.W.1). The accused 1 to 6 belong to Thevar Community. There is an enmity between these two communities. Both the community people conducted Pongal Festival separately. Even in their independent festival, dispute arose between them. Consequently, on a complaint given by the person who belongs to Thevar Community, a criminal case was filed against 13 persons belonging to Harijan Community in which the deceased Santhanaraj was one of the accused. After the registration of the case, one Sudalaimuthu, the brother of the appellants 2 to 4 (A3 to A5) used to threaten the deceased. There were frequent quarrels between the said Sudalaimuthu and the deceased. Ultimately, the said Sudalaimuthu was mrdered by the deceased Santhanaraj. The case was filed against Santhanaraj for the offence under Section 302 I.P.C. and he was convicted and sentenced to undergo life imprisonment. He filed an appeal before the High Court and obtained the order of suspension of sentence and came out on bail. Though the accused as well as the deceased

were living in the same village Karaseri initially, due to murder of Sudalaimuthu, the accused shifted their residence from Karaseri to Vallanadu, Chettanpatti and Morappanadu.

(b) On 27.12.1993, the deceased Santhanaraj left the village and went to Tirunelveli at 10.00 a.m. in connection with taking of loan. P.W.1 Pappa, his wife is working as a servant maid (Aaya) at Noon Meal Centre at Karaseri. P.W.1 after finishing her work at school came to Deivaseyalpuram, since the deceased Santhanaraj promised that he would come by 2.00 p.m. on that day from Tirunelveli to Deivaseyalpuram so that both can join together to purchase household articles. As promised by the deceased, he came to Deivaseyalpuram and met P.W.1 at the Tea Stall of Ramakrishnan, where she was waiting for him. After ordering for tea, the deceased Santhanaraj was sitting in the bench inside the Tea Stall and was reading a newspaper.

(c) Within a few minutes, i.e. at about 2.15 p.m., all the accused persons (A1 to A6) armed with deadly weapons came inside the Tea Stall and attacked the deceased Santhanaraj indiscriminately and caused his death at the spot in the presence of P.W.1 Pappa, his wife, P.W.2 Ramakrishnan, Tea Stall owner, P.W.5 Periasamy and one Ramiah Konar. When the witnesses raised a hue

and cry, the accused ran away from the scene with the weapons.

(d) Then, P.W.1 Pappa, wife of the deceased, accompanied by P.W.2 Ramakrishnan and P.W.5 Periasamy went to Pudukottai Police Station on the same day at about 5.00 p.m. and lodged a complaint (Ex.P1) with P.W.9, the Sub Inspector of Police.

(e) On receipt of the complaint, P.W.9 registered a case in Crime No.609/93 against all the accused for the offences under Sections 147, 148 and 302 I.P.C. He prepared the F.I.R. Ex.P15. He sent these documents to the Court as well as to the superior officers.

(f) On receipt of this F.I.R., P.W.11, the Inspector of Police proceeded to the spot at 6.00 p.m. and prepared observation mahazar Ex.P3 and rough sketch Ex.P16. He also recovered blood stained earth and sample earth from the scene of occurrence. He conducted inquest and examined the witnesses, P.Ws.1,2 and 5 and others. The inquest report is Ex.P7. Then, he sent Ex.P8 requisition to the Doctor for conducting post-mortem.

(g) P.W.6, the Doctor conducted post-mortem on 28.12.1993 and found 31 injuries all over the body of the deceased. He issued Ex.P9 post-mortem certificate giving opinion that the deceased would appear to have died of shock and haemorrhage due to multiple injuries.

(h) On 29.12.1993, all the accused (A1 to A6) surrendered before the Judicial Magistrate, Srivilliputhur in connection with this case. On coming to know of this, P.W.11, the Inspector of Police filed a requisition before the Judicial Magistrate No.1, Tuticorin, who has been examined as D.W.1, requesting custody. Accordingly, on 6.1.1994, police custody was granted. On the same day, he obtained confession from A1 and recovered the weapons M.Os.1 to 6. Then, he arranged for the articles recovered to be sent for chemical analysis.

(i) After completing the investigation, P.W.11 filed the charge sheet against A1 to A6 for the offences under Sections 148, 149 and 302 I.P.C."

3. Before the trial Court, on the side of the prosecution, P.Ws.1 to 11 were examined, Exs.P1 to P18 were filed and M.Os.1 to 13 were marked. On the side of the defence, Elangovan, the Judicial Magistrate, Tuticorin, who received the F.I.R. in this case, was examined as D. W.1 and Exs.D1 to D3 were marked.

4. On questioning the accused under Section 313 Cr.P.C. with reference to the incriminating materials against the accused in the evidence, all the accused stated that they had been falsely implicated and during the relevant time, they were not present at the scene of occurrence, as they were residing in different villages.

5. On an appraisal of the materials available on record, the trial Court acquitted A2 Shanmugavel alone and convicted all the other accused (A1 and A3 to A6) for the offences under Sections 148 and 302 read with 149 I.P.C. Those accused who have been aggrieved by the judgment of conviction, have preferred this appeal.

6. Mr.Shanmugavelayutham, the learned counsel appearing for the appellants, while assailing the judgment impugned, would make the following contentions:
"(1) The sole eye witness P.W.1 Pappa who is interested and inimical is not a reliable witness. She could not have seen the occurrence, since she was to be in the school for doing her work during the relevant time. No valid reason was given by P.W.1 for coming to the place of occurrence by abruptly leaving the school without finishing her work at school. P.W.2, the owner of the Tea Shop where the occurrence had taken place, himself had not supported the prosecution. Furthermore, another independent witness P.W.5 Periasamy, one of the eye witnesses, turned hostile. Therefore, the evidence of P.W.1 has to be rejected in toto.

(2) The evidence of P.W.9, the Sub Inspector of Police, who received the complaint from P.W.1, who stated that he sent the complaint and the F.I.R. on 27.12.1993 itself through P.W.10, the Head Constable and the evidence of P.W.10 that he handed over the complaint and F.I.R. on the same day night to the Magistrate cannot be believed, in view of the fact that in Ex.P1, the complaint and Ex.P15, the F.I.R., the date seal was affixed as 29.12.1993 and in t he entry made by the Judicial Magistrate by putting the date and time, he has not put his signature or initial and as such, the complaint must have been obtained by P.Ws.9 and 11 only two days later and the complaint must have been sent to the Judicial Magistrate (D.W.1), who obliged the Inspector of Police by putting a wrong date as 27.12.1993. Thus, there is a doubt with reference to the timing of the complaint as well as the receipt of the complaint and the F.I.R. by the Judicial Magistrate (D.W.1).

(3) Even assuming that the prosecution case is true, the accused persons armed with different weapons against whom different overt acts have been attributed, cannot be fastened with liability of murder and the part played by each person has to be considered independently and the liability has to be fastened on them only against their respective overt acts. Thus, each individual is liable for the concerned overt acts committed by them and punishment can be imposed only to that effect."

7. In support of the third contention, the counsel for the appellants would cite a number of authorities.

8. In reply to the above submissions, the Additional Public Prosecutor would point out various portions of the evidence and contend that the testimony of P.W.1, though she is the sole eye witness, has given the clear details of the occurrence which is corroborated by the medical evidence and therefore, the accused are liable to be convicted for the offences referred to above, since all the accused went together with dangerous weapons and inflicted injuries on the deceased all over his body repeatedly and indiscriminately till he died. He would also cite various authorities to substantiate his contention.

9. We have carefully considered the submissions made by the counsel for the parties and gone through the records.

10. The main contention urged by the counsel for the appellants that P.W.1 is not a reliable witness and as such, her evidence has to be discarded, especially when the independent witnesses, namely P.W.2 and P.W.5 who had attested the complaint have turned hostile.

11. It is true that P.W.1 being the wife closely related to the deceased. It is also admitted that there are two factions in their village and there is enmity between these two factions, who belong to two different communities. It is also not in dispute that the deceased Santhanaraj was convicted for the murder of Sudalaimuthu, who is the brother of A3 to A5. All the accused who belong to same caste are closely related.

12. The motive for the occurrence as projected by the prosecution is that some years prior to the date of occurrence, Sudalaimuthu, the brother of the accused 3 to 5 was murdered by the deceased and in that case, he was convicted and he obtained bail from the High Court where he filed an appeal.

13. When these things are not disputed, the motive aspect as spoken to by P.W.1 assumes significance. According to P.W.1 being a servant maid (Aaya) of Noon Meal Centre at a school at Karaseri, she finished her work at 12.30 p.m. and came to Deivaseyalpuram as requested by her husband, the deceased Santhanaraj to purchase household articles in Deivaseyalpuram along with her husband.

14. Both in chief and cross-examination, she specifically stated that

she finished her work at 12.30 p.m. and started from the village Karaseri and reached Deivaseyalpuram at about 1.15 p.m. There, she was waiting for her husband, the deceased near the tea stall of P.W.2 Ramakrishnan. At about 2.00 p.m., the deceased as promised came and met her and both of them went to the said Tea stall for taking tea and after ordering for tea, the deceased was sitting in the bench and reading newspaper. At that point of time, all the accused came with weapons and attacked him indiscriminately. This was witnessed by P. Ws.1,2 and 5.

15. After the occurrence was over, P.W.1 went to the police station at Pudukottai and gave a complaint to P.W.9 Sub Inspector of Police. She was accompanied by P.Ws.2 and 5. P.W.9 after receipt of the complaint from P.W.1, obtained the attesting signatures from P.Ws.2 and 5 in the complaint. Thereafter, Ex.P1, the complaint and Ex.P15, the F.I.R. were sent to the Magistrate as well as to the Inspector of Police through P.W.10 Head Constable.

16. Though P.Ws.2 and 5 who are the independent witnesses turned hostile, we cannot reject the evidence of P.W.1 on that score. On the other hand, P.Ws.2 and 5 in their evidence admitted two aspects, one is that they had put signature in the complaint Ex.P1 and another is that the deceased with injuries was found dead in the tea shop.

17. On going through the evidence of P.W.1, it is clear that she came to Deivaseyalpuram at about 1.30 p.m., as she was promised by the deceased that after finishing his work at Tirunelveli in connection with obtaining of loan, he would come and join her at Deivaseyalpuram at about 2.00 p.m. so that both can purchase the household articles there.

18. On a further scrutiny of the entire evidence, it is noticed that nothing has been elicited from her cross-examination to indicate that she was speaking falsehood. As a matter of fact, she specifically stated that she was working as Aaya in an elementary school having classes I to V and her work could be completed before 1.00 p.m. It is also seen from her evidence that the distance between Karaseri and Deivaseyalpuram is only two or three miles and she reached Deivaseyalpuram within 45 minutes by walk.

19. Under those circumstances, the reason given by P.W.1 for coming to the scene village is quite acceptable, especially when she was able to give full details about the shop in which the occurrence had taken place.

20. It is contended that in the complaint, she had stated only with reference to some overt acts against each of the accused, but in the evidence, she had improved that all the accused gave cuts repeatedly.

21. On going through Ex.P1 and the evidence of P.W.1 we are not able to accept the submission of the counsel for the accused with regard to the alleged improvement. On the other hand, in the complaint also, she stated after giving the particulars of the overt acts attributed to each of the accused, that all the persons thereafter attacked the deceased with the weapons they carried with them.

22. Merely because she is relative of the deceased and there are two factions, as held by this Court as well as the Supreme Court, we cannot reject her evidence in toto, particularly when in these type of cases, the independent witnesses like shop owner and the person who came to tea shop to take tea would be afraid of saying anything against accused as they would feel that their life would be in danger at the hands of the accused. The fact remains as noted above that both the witnesses, P.Ws.2 and 5 admitted their signatures in Ex.P-1.

23. In such circumstances, there is no reason to reject the evidence of P.W.1 who stated that she went to the police station at 5.00 p.m. accompanied by P.Ws.2 and 5 and gave a complaint giving the full details of the occurrence implicating all the accused.

24. Yet another feature which is noticed in the deposition of P.W.1 is that even in the beginning in the chief examination, she straightaway stated that the person who was standing before the Court as second accused was not the person arrayed as A2 in the complaint. According to her, Shanmugavel arrayed as A2 was some other man. The entire deposition of P.W.1 would make it clear that she gave all the details of the overt acts against all the accused including the said Shanmugavel who was arrayed as A2 in the complaint. This fairness on the part of P.W.1 makes us to feel that she is a true and trustworthy witness.

25. An attempt has been made to create a doubt in the minds of this Court by stating that the complaint must have been obtained two days later, since the Court seal found in Ex.P1, the complaint and Ex.P15, the F.I.R. shows that the same were receiv n 29.12.1993. But, the close perusal of these documents would clearly indicate that the seal contains the date as 28.12.1993. The entry made by the Judicial Magistrate in both the documents would show that the same were received at 12.20 night on 27.12.1993.

26. Furthermore, the Judicial Magistrate was examined as defence witness (D.W.1) who had categorically stated in the cross-examination that entries were made by him on the night of 27.12.1993 as the receipt of the documents was at 12.20 night on 27.12.1993 at his house and the seal was affixed next day i.e. on 28.12.1993.

27. The most disturbing feature we could notice in this case is that merely because the seal was shown as if it was affixed on 29.12.1993 , the Judicial Magistrate was summoned to put the suggestion on defence that though these documents were received on 29.12.1993, the Judicial Magistrate purposely obliged P.W.11, the Inspector of Police by making a wrong entry as 12.20 pm at night 27.12.93 even without putting his initial.

28. The Judicial Magistrate in his evidence both in chief and cross has categorically stated that he did not oblige the Inspector of Police and he received the documents at 12.20 night on 27.12.1993 and the seal shown in the same was only 28.12.1993 and not 29.12.1993. Furthermore, the inquest was held on 27.12.1993 night and the inquest report Ex.P17 was received by the Judicial Magistrate on 28.12.1993. The seal also would show that it was affixed on 28.12.1993. If the plea of the defence that the complaint and the F.I.R. were received only on 29.12.1993 is true, the inquest report would not have been received by the Court concerned on 28.12.1993. Therefore, the

defence plea made by the accused that Exs.P1 and P15, the complaint and the F.I.R. were received on 29.12.1993 has to be rejected as a false and mischievous one.

29. Yet another disquieting feature that we could see is that the Judicial Magistrate who received the F.I.R. has been unnecessarily summoned as a defence witness and he was subjected to lengthy and irrelevant examination by putting a suggestion imputing motive against the Magistrate himself. D.W.1, the Judicial Magistrate had passed an order granting police custody to the Inspector of Police (P.W.11) on the request made by P.W.11. Unfortunately, a suggestion was put to the Judicial Magistrate that the said order of police custody was illegal and wrong. This is nothing but an act of harassing and demeaning the Judicial Officer (D.W.1) who has done his duty judiciously.

30. We could only express our displeasure over the misconduct of the lawyer who conducted the case on behalf of the accused. This sort of summoning the Judicial Officers to give evidence with reference to the orders passed by them and attributing motives against them while they were in box is highly condemnable and reprehensible. The way in which the questions had been put to D.W.1, the Judicial Officer by the counsel for the accused would clearly indicate that the counsel for the accused has not understood the ethics of the profession and not conducted himself properly, and on the other hand, his act of having insulted the Judicial Officer by putting questions imputing motives and having suggested that he was not honest would amount to clear contempt.

31. According to P.W.11, the Inspector of Police, he obtained police custody and interrogated all the accused and A1 gave a confession and in pursuance of the same, he recovered all the weapons M.Os.1 to 6 on 6.1.1994.

It may be true that P.W.6 Doctor would state that the weapons were shown to him next day to the post-mortem. The postmortem was conducted on 28.12.1993. The above statement of the Doctor is purely a mistake for the reason that both P.W.4, the V.A.O. and P.W.11 , the Inspector of Police would state on the strength of the confession Ex.P6 and the mahazar Ex.P5 that the weapons were recovered only on 6.1.1994 in pursuance of the confession given by A1. Therefore, the contention that the weapons would not have been recovered on 6.1.19 94 cannot be accepted.

32. Lastly, it was contended that the accused cannot be convicted for the offence under Section 302 read with 149 I.P.C. and the liability has to be fastened on them only against their respective overt acts. This contention also, in our view, is quite wrong.

33. The provisions contained in Section 149 I.P.C. would be attracted whenever any offence is found committed by any member of an unlawful assembly in prosecution of the common object of that assembly or when the members of that assembly knew that the offence was likely to be committed in prosecution of that object. Every person, who at the time of committing of that offence is a member of that group, will also be vicariously held liable and guilty of that offence.

34. Common object does not require prior concert and a common meeting of minds before the attack. An unlawful object can develop after the accused assembled. The existence of the common object of the unlawful assembly has to be ascertained in the facts and circumstances of each case.

35. The above principles have been laid down by the Supreme Court in CHANDRA BIHARI GAUTAM v. STATE OF BIHAR (2002 CRI.L.J.2541) and RAMESHWAR DAYAL v. STATE OF M.P. (2002 S.C.C.(Cri) 515).

36. In the instant case, the appellants constituted an unlawful assembly and thereafter, reached the place of occurrence armed with dangerous weapons like vel kambu and aruval and participated in the attack by mercilessly beating the deceased after surrounding him.

37. Further, all the appellants not only came with the dangerous weapons, but also inflicted injuries on various parts of the body repeatedly and indiscriminately as stated by P.W.1 causing 31 injuries all over the body of the deceased, which resulted in the instantaneous death at the spot. P.W.6, the Doctor in Ex.P9, the post-mortem certificate would clearly opine that the deceased would appear to have died of shock and haemorrhage due to multiple cut injuries of the neck - cutting the windpipe and major blood vessels of the neck and of the face and lungs. He also would state in his evidence that death was due to shock and haemorrhage due to the multiple

injuries. Thus, in view of the above fact situation, in our opinion, it has been substantially established that the common object of the appellants was nothing but to murder the deceased.

38. Under those circumstances, this Court cannot consider individual overt acts to modify the nature of the offence.

39. In view of the above above discussion, we do not find merit in any of the contentions urged by the counsel for the appellants. Consequently, the appeal is dismissed confirming the conviction and sentence imposed on the appellants/A1 and A3 to A6 by the trial Court.

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